UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SEATON INSURANCE COMPANY, f/k/a UNIGARD MUTUAL INSURANCE COMPANY,

Plaintiff,

v.

ILLINOIS UNION INSURANCE COMPANY, f/k/a GATX INSURANCE COMPANY,

Defendant.

C.A. No. 07-332-ML

DEFENDANT ILLINOIS UNION INSURANCE COMPANY'S SURREPLY IN OPPOSITION TO PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL

In its opening brief, Seaton made two arguments in support of its motion to disqualify. First, Seaton argued that the conflicts waiver obtained by Crowell & Moring in 2001 from Seaton's agent, Randall/Cavell, and confirmed in the June 2003 Waiver Letter, was "*not* binding" because "Seaton never authorized Randall America to waive any conflicts on its behalf." (Seaton Opening Br. at 4.)[1] Seaton further contended that even if the June 2003 Waiver Letter did confirm a conflicts waiver, the recipient of the letter, Thomas Ryan, did not have the authority to "bind either Randall America or Seaton because Mr. Ryan was never an employee of either company." (*Id.* at 10.)[2]

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1 *See also* Opening Br. at 5 (Seaton did not "explicitly or implicitly vest Randall America with the authority to waive conflicts of interest on its behalf in any particular matter"); *id.* at 8 ("Randall America lacked the authority . . . to act as Seaton's agent for the purpose of granting a conflict waiver"); *id.* at 9 ("Randall America lack[s] express authority" and "also lacked implied authority"); Follis Affidavit at ¶ 7 (Randall/Cavell had no "authority to waive conflicts" but was "merely responsible for the administration of insurance and reinsurance claims for Seaton").

2 *See also* Opening Br. at 5 (Mr. Ryan "is not an employee of Randall America and has never worked for Randall America"); Follis Affidavit at ¶ 9 ("Thomas R. Ryan, Esq. is not an employee of Randall America").

In response, Illinois Union pointed out, among other things, that (1) the statements made by Seaton concerning the scope of Randall/Cavell's authority were directly at odds with statements Seaton made regarding Randall/Cavell late in 2007 in a separate action pending in a New York federal court, (2) under well-established Rhode Island law, Randall/Cavell did have actual, implied, and apparent authority to waive conflicts on behalf of Seaton, (3) in 2001, when Randall/Cavell's Robert Burns retained Crowell & Moring on behalf of Seaton and other insurers, Mr. Burns understood and accepted a broad, advance conflicts waiver, and (4) Mr. Ryan held himself out as an employee of Randall/Cavell (even signing discovery responses in federal court where he stated he worked for Randall/Cavell) and, according to Ken Randall, who had helped form Randall/Cavell, was a Randall/Cavell employee.

Second, Seaton argued that any waiver that had been granted had been revoked, particularly since Seaton subsequently terminated its relationship with Randall/Cavell. (Opening Br. at 10-11.)[3] In response, Illinois Union noted, among other things, that even assuming Seaton had attempted to revoke the waiver (which Illinois Union disputes), Illinois Union and the other ACE USA Companies had relied to their detriment on the conflict waiver. (Opposition at 4-7.) Illinois Union cited the well-settled case law that prevents an attempted revocation where a client, like the ACE USA Companies, has relied on the waiver. (*Id.* at 25-26.) Illinois Union also noted the actions taken by an agent (Randall/Cavell) that bind a principal (Seaton) continue their binding effect even after an agent has been released because any other rule would allow a company to be relieved of its obligations simply by terminating its agent. (Opposition at 24.)

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[3] *See also* Opening Br. at 6 (waiver "has been revoked"); *id.* at 10 ("the waiver has now been revoked"); *id.* ("Seaton has since revoked its consent); *id.* at 11 ("Any consent by or on behalf of Seaton . . . has been withdrawn").

In the face of Illinois Union's opposition, Seaton's "reply" memorandum attempts to re-write its opening motion. But in asserting new arguments and abandoning old ones, Seaton's "do over" leaves the following facts, among others, wholly undisputed:

- In 2001, when Randall/Cavell retained Crowell & Moring on behalf of Seaton and other insurers, the advance conflict waiver was negotiated between Crowell & Moring's Clifford Hendler and Randall/Cavell's Robert Burns. Mr. Burns was a legally trained senior claims official who understood the nature of the business involved and the impact of such an advance waiver and was clearly qualified to give informed consent for such a waiver. These discussions, and the advance waiver agreed to by Mr. Burns, are not mentioned even once in Seaton's reply brief, the Ryan affidavit or the supplemental Follis affidavit and for an obvious reason – they are at odds with the position Seaton is asserting in this litigation.

- The ACE USA Companies (including Illinois Union) relied on the advance conflict waiver and would not have allowed Seaton and the other Randall/Cavell insurers to retain Crowell & Moring if the ACE USA Companies were going to be precluded from hiring Crowell & Moring (as they had for nearly 15 years) to represent them in any dispute in which Crowell & Moring was not already representing a Randall/Cavell insurer.

- Randall/Cavell's Brian Bendig had a specific understanding that the conflicts waiver confirmed in the June 2003 Waiver Letter was a "broad waiver." Seaton mentions Mr. Bendig just once in its reply, but only to say that his understanding of the scope of the waiver does not bind Seaton because Seaton had terminated its relationship with Randall/Cavell two months before the date of Mr. Bendig's "broad waiver" email. But there is no dispute that Mr. Bendig understood that the conflicts waiver in the June 2003 Waiver Letter was a "broad" one.

- Seaton waited nearly 15 months before asserting its conflict arguments. Seaton knew in 2006 that the ACE USA Companies had hired Crowell & Moring to represent them in a series of related reinsurance disputes against Seaton (including the dispute that lead to this action). In October 2006, Seaton's Mr. Follis was provided with a copy of the June 2003 Waiver Letter, with Mr. Hendler explaining to Mr. Follis the agreements that had been reached with Mr. Burns.[4] It was not until November 2007 that Seaton raised a conflict issue and then only because the reinsurance disputes between Seaton and the ACE USA Companies had not been resolved to Seaton's liking.

- Crowell & Moring does not have any confidential Seaton information concerning the matters in this dispute. Seaton does not dispute that Crowell & Moring has put in place an ethics wall; nor does it contend that Crowell & Moring's representation of Illinois Union in this action will affect its representation of Seaton in other matters.

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4 Seaton argues that after being provided with the June 2003 Waiver Letter by Mr. Hendler, Crowell & Moring took no steps to negotiate a conflicts waiver. (Reply at 7.) Seaton does not explain why Crowell & Moring would need to negotiate a waiver when one already was in place and had been in place for several years.

Seaton has, however, raised for the first time in its reply brief two brand new arguments. First, Seaton changes course and now argues that, although Randall/Cavell may have had some authority to grant conflicts waivers, the waiver that Randall/Cavell provided was "very limited" in scope. (Reply at 5.) To make this argument, Seaton points to the same Mr. Ryan, who it originally attempted to discredit as having no authority to act on Seaton's behalf. Mr. Ryan states in his affidavit that he understood the June 2003 Waiver Letter to apply only to cases where policyholders had sued both the ACE USA Companies and Randall/Cavell insurers in the same case (and where the insurers' interests would be aligned) and not in situations where the two companies would be "actually adverse." (*Id.*)[5]

Mr. Ryan's interpretation of the June 2003 Waiver Letter is simply not plausible. In the first instance, the letter does not distinguish between different types of adversity. There would also be no reason for the ACE USA Companies to insist that Seaton and the other Randall/Cavell insurers agree to an advance waiver only in cases where there was no "actual" adversity (or at most the possibility of adversity on some issues), as Mr. Ryan contends. (Ryan Affidavit at ¶ 11)[6] Clearly if the ACE USA Companies wanted to be able to continue to retain Crowell & Moring because of the firm's long-standing relationship with the ACE USA Companies – Mr. Ryan concedes that was the ACE USA Companies' goal (*id.* at ¶ 9) – it would

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5 In its reply Seaton says – without any support whatsoever – that the June 2003 Waiver Letter was an attempt "to construct an elaborate game of 'gotcha'" because the waiver language was supposedly "[b]uried in the letter [in] an isolated paragraph." (Reply at 2.) On the other hand, Seaton says that Mr. Ryan had a specific understanding of the scope of the waiver when he read the supposedly buried language nearly five years ago. Beyond being obviously contradictory, both statements are wrong. The June 2003 Waiver Letter addressed retention issues – rates, staffing, conflicts, etc. – and the waiver language itself took up nearly an entire page of the 3-½ page letter. Furthermore, as discussed below, Mr. Ryan's "understandings" (never expressed to Mr. Hendler) are both implausible and at odds with (1) Mr. Hendler's discussions with Mr. Burns, (2) the acknowledgement by Mr. Bendig of the "broad waiver," and (3) Randall/Cavell's failure to object when Crowell & Moring represented the ACE USA Companies in cases where there was actual adversity.

6 In any event, Mr. Ryan's subjective beliefs would not be relevant if they were not expressed to Mr. Hendler, and Mr. Ryan does not state that he expressed them to Mr. Hendler.

make no sense if the waiver addressed only very narrow situations where there would likely be no adversity at all and excluded situations of actual adversity.

Mr. Ryan's supposed concerns about the scope of the advance waiver also cannot withstand scrutiny. The letter clearly addresses conflicts where Crowell & Moring would represent the ACE USA Companies (or other firm insurance clients) with regard to insurance-related matters; the waiver obviously does not apply to, for example, a labor or real estate dispute against Seaton.

Moreover, Mr. Ryan does not dispute at all that Mr. Hendler and Mr. Burns, who negotiated the conflicts waiver for Crowell & Moring and Randall/Cavell, had a much different understanding as to the breadth of the waiver confirmed in the June 2003 Waiver Letter. (*See* Opposition at 4-5.) Indeed, Mr. Ryan does not mention Mr. Burns at all. Mr. Ryan also does not dispute that Mr. Bendig, also with Randall/Cavell and also unmentioned by Mr. Ryan, had a much different understanding as to the breadth of the waiver. (*See id.* at 7-8.) Finally, Mr. Ryan forgets (or at a minimum does not dispute) that Crowell & Moring has represented the ACE USA Companies in other cases of actual adversity to Randall/Cavell insurers without objections from Mr. Ryan or anyone else. (*See id.*)

Second, Seaton now argues that it "did not receive any consideration" from Crowell & Moring for the conflicts waiver. (Reply at 7.) But the consideration Seaton obtained is obvious: but for the fact that Randall/Cavell, on Seaton's behalf, granted the advance conflict waiver, Crowell & Moring would not have represented Seaton. In 2001, when Seaton wanted to retain Crowell & Moring, the ACE USA Companies had insisted that Crowell & Moring not take on other insurance clients, for fear that Crowell & Moring might find itself in the position of having to decline work requests from the ACE USA Companies. In exchange for being able to retain Crowell & Moring, Seaton agreed to a broad conflicts waiver.

Notwithstanding Seaton's new arguments, there is still no reason for denying Illinois Union its choice of counsel.[7]

ILLINOIS UNION INSURANCE COMPANY, f/k/a GATX INSURANCE COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DEFENDANT ILLINOIS UNION INSURANCE COMPANY'S SURREPLY IN OPPOSITION TO PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL was filed with the Clerk of the United States District Court for the District of Rhode Island this _____ day of _____________, 2008 and is available for viewing and downloading to the following ECF registered counsel of record:

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[7] One of the few new cases that Seaton cites in its reply, *Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp. 2d 579 (D. Del. 2001), again supports a denial of Seaton's motion. In *Elonex*, the court refused to disqualify a law firm even if there had been no conflict waiver. There, the court noted that it had "wide discretion" in addressing the conflict issue and denied the motion to disqualify because the client had a compelling reason to retain its counsel and the movant's characterization of the relationship between that client and the law firm was "somewhat disingenuous." *Id.* at 583, 584.